

The Triple Threat Trial Counsel

Captain Ryan Howard*

While many new trial counsel invest exclusively in developing as a litigator, the successful trial counsel manages a diverse three-asset portfolio, acting as a sound staff officer, adept diplomat, *and* skilled lawyer.

The Staff Officer

Staff officership is the corner-stone to a successful tour as a trial counsel. Great staff officers “C-A-V”—they communicate, anticipate, and validate. Mission success depends largely on the trial counsel’s ability to communicate effectively with their brigade and with the office of the staff judge advocate (OSJA). As a member of the brigade staff, trial counsel should brief the status of *relevant* legal actions vertically up and down the chain of command and laterally across the brigade staff. There are a number of techniques to facilitate effective communication throughout the brigade: standing office calls,¹ command and staff,² legal briefings

* Judge Advocate, U.S. Army. Presently assigned as Knowledge Management Attorney, International and Operational Law Division, Office of The Judge Advocate General, U.S. Army, Pentagon, Washington, D.C. Captain Howard was formerly the Brigade Judge Advocate (BJA), 159th Combat Aviation Brigade, 101st Airborne Division (2007–2008) and the Senior Trial Counsel for the 21st Theater Sustainment Command (2009–2011). Captain Howard is also a certified Lean Six Sigma Green Belt.

¹ The successful trial counsel leaves his office and physically goes to see his company commanders and their first sergeants on a regular basis. At a minimum, trial counsel should do this on a monthly basis. At the initial meeting with the command team, the trial counsel should provide a business card with all relevant contact information, a once over on the military justice system, and close the meeting with a forceful recommendation for the command team to call if they believe there is a potential legal issue. Subsequent meetings should include a report on current military justice actions, and, if time permits, a two-minute educational brief on a relevant military justice issue (e.g., pretrial confinement). Commanders who experience this level of communication from their trial counsel are more likely to appreciate the trial counsel’s role in supporting them, to call the trial counsel with legal issues *before* they get out of hand, and to understand nonconcurring legal reviews (e.g., legally insufficient Article 15). On the other hand, commanders who first meet their trial counsel when the trial counsel recommends against an Article 15, or shows up demanding resources for a court-martial, are likely to have a different opinion and may want to work around their lawyer instead of with him.

² Briefing at command and staff is a tremendous opportunity for a trial counsel—it provides a venue for the trial counsel to highlight their mission to commanders, a forum for networking with the staff, and an opportunity for the trial counsel to grow as a staff officer. If unprepared, however, command and staff meetings present a considerable risk. Consequently, successful trial counsel master the status of their actions, anticipate questions from commanders and staff officers, ensure their material is relevant to their audience and appropriate for the group forum, and avoid ancillary issues with other staff sections. When a trial counsel finds that a particular staff section routinely briefs their actions are held up at “legal,” the trial counsel should talk to the staff primary after the meeting, work to resolve the instant matter, and then ask if, in the future, he can receive notice prior to command and staff. The value-added trial counsel will go one step further and resolve these issues *prior* to command and staff.

for leadership,³ legal situation reports and newsletters, and SharePoint webpages. Communicating clearly within the legal community is equally important. While there are countless methods for effective communication, the value-added trial counsel will ask two questions: (1) Does the chief of justice know the precise status of all my actions? and (2) Do the paralegals know exactly what I need next?

Second, excellent staff officers anticipate. Trial counsel who can identify “what is next” for their command are extremely valuable. While many lawyers are able to prosecute misconduct, great judge advocates enable commanders to *prevent* misconduct by analyzing metrics, identifying patterns, and making specific recommendations. High performing trial counsel will first analyze their current blotters and identify high risk formations and populations. Then the trial counsel will analyze the previous year’s blotters for the following month (i.e., eleven months prior) and identify any seasonal trends.⁴ Having analyzed the data, the trial counsel will then brief “what is coming next” at their weekly command and staff meetings *and* provide recommendations.⁵ In addition to trends within the brigade, trial counsel should also examine patterns of misconduct occurring in similar sister formations⁶ and more generally

³ In addition to monthly desk side briefs, successful trial counsel provide annual military justice training to all command teams within the brigade. This “military justice leader’s brief” should address each of the commander’s military justice tools, walking the leaders across the spectrum of military justice actions: administrative (e.g., letters of reprimand), non-judicial (e.g., Article 15s), and judicial (e.g., court-martial). Moreover, the briefing should include frequent reminders to “call your trial counsel.” Additionally, trial counsel should brief common legal issues, misconduct trends, and relevant recommendations. When scheduling the training, time the briefing following an influx of new commanders (e.g., August following change of command season). If properly executed, unit leadership will realize: (1) the trial counsel cares; (2) the trial counsel can and will help; and (3) they should call the trial counsel if they believe they have a legal issue.

⁴ For example, in August 2011, trial counsel should pull the August, September, and October 2010 blotters, and look for any increases in misconduct.

⁵ For example, trial counsel should brief, “Based on my review of misconduct from this quarter last year, I anticipate an increase in junior enlisted alcohol-related misconduct in the coming month. I recommend first-line supervisors meet individually with Soldiers E-4 and below under the age of twenty four every Friday during the weeks of Oktoberfest.” While such a recommendation may seem obvious to judge advocates, it will be well received by commanders because it is specific, relevant, and supported by facts.

⁶ As the BJA for an aviation brigade, I was fortunate that Fort Campbell supported a second aviation brigade with whom I could compare and contrast metrics. While comparing like brigades may be difficult, comparing companies is very feasible. During the weekly military justice huddle, ask other trial counsel if there are trends in formations similar to yours.

across their divisions.⁷

Third, great staff officers validate, they do not “fire and forget.” Within the legal office, the successful trial counsel tasks paralegals with clear expectations and specific deadlines. The trial counsel will then follow through on the suspense, asking the paralegal for the status of the action on the deadline.⁸ Over time, paralegals should learn to back-brief the trial counsel immediately prior to the suspense. Outside the legal office, the value-added trial counsel will routinely present status reports to both her commanders and members of the OSJA. Keeping commanders and judge advocates properly informed is not simply a standing trial counsel duty, it is smart business. There are great efficiencies in taking the initiative to brief the status of actions rather than responding to requests for information (RFI). As the trial counsel accurately tracks and briefs the status of legal actions, the RFIs from commanders and judge advocates will slow. As a result, the trial counsel will have more time to advance actions, reducing the processing times for legal actions. As actions are completed faster, the trial counsel will receive fewer RFIs, and the process will grow more efficient.⁹ Additionally, there is an air of professionalism that attaches to the trial counsel who takes the initiative—an increased credibility that creates trust and even greater efficiency.

Fourth, staff officers are professional. In addition to C-A-V, trial counsel should digest and live Lieutenant Colonel Mike Ryan’s “10 Basics for Every Officer”¹⁰: (1) Be in the right place, at the right time, with a professional military appearance; (2) Be patient, have perspective, and maintain a positive attitude; (3) Stay calm—anger never wins; (4) Learn

⁷ Consider enlisting the support of long-serving civilians who enjoy more experience with the trends in your location. While it may take a trial counsel a year to identify seasonal changes in misconduct, the civilians will know, for example, that misconduct in Kaiserslautern increases during the Bad Dürkheim wine festival.

⁸ As staff officers, trial counsel are also leaders (and sometimes raters) of their paralegals. Thus, while giving clear instructions on specific assignments, the successful trial counsel avoids usurping the functions or undermining the authority of his noncommissioned-officer-in-charge. Moreover, trial counsel must immediately identify any noncommissioned officers they will rate, track accomplishments as they happen, and recommend awards or letters of commendation when warranted. Thus, the enlisted Soldiers know their responsibilities and know they will be held accountable for their actions, but they also know they will be recognized for their hard fought achievements.

⁹ This also works in the reverse. Inefficient trial counsel who fail to respond to RFIs accurately or in a timely manner inject uncertainty into the process and lose credibility. Having “chummed the waters,” the inefficient trial counsel will receive more RFIs. As a result, the trial counsel will then have less time to move actions as they spend more time answering RFIs. Successful trial counsel reverse this cycle by briefing accurate information before superiors ask, building trust and ultimately closing actions faster.

¹⁰ Lieutenant Colonel Mike Ryan, *Azimuth, Distance, and Checkpoints—Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates*, ARMY LAW., Aug. 2005, at 40.

the craft—ask questions, admit mistakes, and share credit; (5) Never question motives; (6) Offer solutions, not just problems—after spotting an issue, what are *you* going to do to help; (7) Be a problem solver—start at the beginning of a problem, think through a solution, and work hard; (8) Rise to the occasion—never shy away from difficult missions, jobs, or schools; (9) Know that your efforts ultimately contribute to mission success—you are relevant; and (10) Be bigger than yourself—being an officer means putting the needs of your Soldiers, unit, and country ahead of yourself. The successful trial counsel is a constant professional who initiates Communication, Anticipates misconduct, and Validates progress.

The Diplomat

The second asset in the triple threat trial counsel portfolio is that of diplomacy. Value-added trial counsel tactfully manage relationships as they navigate actions through their command and the OSJA. Within the brigade, trial counsel are conduits between each echelon of command and members of the brigade staff. Within the OSJA, trial counsel are intermediaries between their brigades and the OSJA, especially members of the military justice team. Successful trial counsel develop courses of action (COAs), *in coordination with* the OSJA, that provide the best opportunity to secure the command’s desired end-state. By coordinating with the OSJA, the trial counsel keeps the legal community apprised of her actions while simultaneously securing the technical support necessary to achieve the commander’s legal goals. Given the potential for distinct perspectives, the successful trial counsel is diplomatic.

While there are countless ways to be diplomatic, a few are worth emphasizing. First, the successful trial counsel is a key member of both the brigade and OSJA teams. She will appear indigenous to both the brigade she supports and the OSJA that supports her. When the trial counsel is at command and staff, she is a Task Force Thunder staff officer.¹¹ When she is attending a military justice meeting, she is one of the chief of justice’s prosecutors and a member of the OSJA.¹² Once the trial counsel is recognized as a loyal member of both the OSJA and brigade, the two teams synergize, creating efficiencies and catalyzing positive change for good order and discipline.¹³

¹¹ Trial counsel should attend all brigade functions: go to the dining in and the dining out; play on intramural sports teams; participate in the golf outing; attend family readiness group meetings, etc.

¹² Trial counsel physically working at brigades must be deliberate to maintain contact with the office of the staff judge advocate (OSJA). Trial counsel should physically attend the chief of justice meetings, interact with fellow trial counsel, and preserve close working relationships with other sections of the OSJA.

¹³ In addition to fostering these business efficiencies, trial counsel should *want* to be active in both the legal and brigade communities for the sake of it. The *esprit de corps* and genuine fellowship enjoyed in both circles will

Second, trial counsel must understand their roles as staff officers. Regarding military justice actions, trial counsel lack the authority to issue orders or make substantive decisions—trial counsel merely recommend. Consequently, while a contemplated COA may have negative legal repercussions, trial counsel rarely, if ever, tell commanders “no.” Instead, diplomatic trial counsel couch their legal analysis in terms of recommendations, risk, and COAs.¹⁴ Moreover, the valued trial counsel will develop legal alternative COAs in support of the command’s desired end-state when they confront legal impediments.¹⁵ The triple threat trial counsel will leverage his creativity to legally and ethically negotiate obstacles on behalf of his command.

Finally, trial counsel must acknowledge and reward the efforts of their strategic enablers—but for the efforts of paralegals, translators, court reporters, law enforcement, and other logistics support, the trial counsel would fail. No court-martial is possible without hundreds of seemingly minor events transpiring. Win or lose, trial counsel should take time to acknowledge the outstanding efforts of these key contributors.

The Lawyer

Finally, successful trial counsel are skilled lawyers who serve as the protagonists of military justice by mastering their craft, swiftly advancing legal actions, and maintain focus on promoting good order and discipline.

Successful trial counsel labor to master their craft. There is no substitute for a trial counsel sitting alone in his office late at night simply mastering the facts of their cases,¹⁶ reading the relevant authority,¹⁷ and applying the

yield great memories and friendships that will last throughout one’s career in the Judge Advocate General’s Corps and the Army.

¹⁴ When trial counsel phrase their recommendations in ways that sound like orders, they appear to have outstripped their role as a staff officer and will be quickly corrected. The trial counsel’s recommendations are more likely to be properly considered if her thoughts are framed in a manner familiar to the commander. While attending command and staff, trial counsel should listen to, learn from, and brief like the S-3. For example, “Sir, I strongly recommend against this course of action because you are accepting considerable risk of. . . .” is much better than, “You can’t.” In those rare cases where the trial counsel believes the answer is “no,” he should consider leveraging the support of the OSJA to craft the best possible legal advice.

¹⁵ The trial counsel may still be able to achieve *what* the commander desires, though not in the *way* the commander suggests. Without accepting legal or ethical risk, trial counsel should assist their command in navigating legal obstacles. However, trial counsel must never accept legal risk to satisfy their commander and not fully inform the commander of the risks he or she is accepting. While there are times the commander may *knowingly* disregard the trial counsel’s recommendation, trial counsel must ensure such a decision is never made *unknowingly*.

¹⁶ Successful trial counsel master the facts as early as possible—long before charges are preferred. There is no substitute for a trial counsel getting out of the office to meet with law enforcement, read police reports, talk to witnesses, and go to the scene of the crime. Successful trial counsel do not

facts to the law. While trial counsel should always know reach-back support from the senior trial counsel and chief of justice is available, real growth occurs when the trial counsel takes ownership of their actions. In support of professional growth, chiefs of justice should ask trial counsel prior to assisting them, “Have you researched this?” and “What do you think?” Additionally, committed trial counsel understand the focus required to become skilled at military justice and they set the conditions for success. While conducting serious legal thought, the prudent trial counsel blocks research and study time in order to allow for genuine legal analysis¹⁸—they close the door, give the phone to a paralegal,¹⁹ minimize the email, and read, analyze, and read some more. *Then* they call a fellow trial counsel, the senior trial counsel, or the chief of justice.

Second, the value-added trial counsel advances each action daily with a genuine sense of urgency. By moving actions swiftly, the trial counsel promotes deterrence by demonstrating the nexus between crime and punishment. Moreover, timely resolution of misconduct advances the interests of due process for all parties. Trial counsel can improve the timeliness of their actions by improving their brigade legal systems and by prioritizing their own work. Opportunities for systemic improvements abound. Trial counsel should leverage paralegal support to identify the systems that need the most improvement, conduct analysis

wait for a final report of incident (ROI) before getting to work. Outstanding trial counsel develop a close working relationship with law enforcement so that they receive a phone call when the crime is first discovered. With such a relationship, the trial counsel can shape the investigation with a view toward court-martial rather than reacting to the investigation.

¹⁷ As the facts are solidifying, the successful trial counsel analyzes the elements of potential offenses, as well as evidentiary foundations, and leverages paralegal and law enforcement support to secure the witnesses required to prove the elements. The successful trial counsel also reevaluates the case as the investigation proceeds, and if it is too weak to try, is not afraid to say so. His prosecution memos are balanced and realistic, not advocacy, so that the OSJA understands what supporting this prosecution really means, and referral decisions are *informed* decisions.

¹⁸ Given the countless demands competing for trial counsel attention, many trial counsel fall prey to multi-tasking. In the alternative, successful trial counsel prioritize and give their very best effort to the task at hand. Recent studies suggest that multi-tasking undermines serious thought. In 2007, a group of Microsoft workers took, on average, fifteen minutes to return to serious mental tasks, such as writing reports or computer code, after addressing an incoming email. Steve Lohr, *Slow Down, Brave Multitasker, and Don't Read this in Traffic*, N. Y. TIMES (Mar. 25, 2007), <http://www.nytimes.com/2007/03/25/business/25multi.html?pagewanted=1>. In 2009, Clifford Nass found that people who routinely manage numerous information streams, have less cognitive control than those who focus on one task at a time. Eyal Ophir, Clifford Nass, & Anthony D. Wagner, *Cognitive Control in Media Multitaskers*, 106 PROC. NAT’L ACAD. SCI. 15583 (2009), available at <http://www.pnas.org/content/106/37/15583.full?sid=798ac0d7-c493-46b6-8582-4d8cb88ecb6e>.

¹⁹ However, trial counsel must remain accessible—especially to commanders. Consequently, successful trial counsel block research and study time during slow timeframes and provide specific criteria to their paralegals to forward phone calls based on the rank or position of the caller or the subject matter of the phone call.

supported by metrics to develop solutions, and implement improvements.²⁰ In a duty position with numerous competing requirements, successful trial counsel prioritize their work based on an action's importance (i.e., the significance of the task or the source of the tasking) and urgency (i.e., deadline).²¹ The successful trial counsel finds a way to satisfy the requirements of the OSJA and the brigade through proper prioritization.

Third, successful trial counsel are able to focus in the midst of chaos. New trial counsel are frequently overwhelmed by the voluminous number of complex and serious military justice actions pending in their jurisdiction.

Successful trial counsel block out distractions and focus on the task at hand in two ways. First, they identify the next step for each action, and give their very best to *that*

particular step.²² Second, trial counsel should form a military justice mission statement nested with the SJA's vision and the Commander's philosophy. When actions mount and pressure builds, the successful trial counsel steps back, turns to her mission statement, attains perspective, and gets back to the task at hand. Successful trial counsel are poised professionals who complete a complex process consisting of hundreds of steps and numerous stakeholders by addressing one step at a time.

The successful trial counsel is a sound staff officer, an adept diplomat, and a skilled lawyer—three distinct skill sets that stretch all judge advocates in unique ways as we navigate careers in the one of the most interesting and challenging professions in the world.

²⁰ Trial counsel should consider the Lean Six Sigma "DMAIC" model of problem solving: Define the problem; Measure each step of the current state timeline; Analyze the steps that deviate the most from the desired processing time; Improve those steps; and Control the process by sustaining the improvements. *Lean Six Sigma*, U.S. ARMY OFFICE OF BUS. TRANSFORMATION, <http://www.armyobt.army.mil/cpi-kc-tools-lss.html> (outlining the DMAIC model of problem solving).

²¹ Each week, trial counsel should prioritize their pending actions based on two criteria: importance (i.e., significance) and urgency (i.e., deadline). Then the trial counsel should categorize their actions as (1) *High Importance/High Urgency*—address these actions first; (2) *High Importance/Low Urgency*—set a deadline; (3) *Low Importance/High Urgency*—find efficient ways to complete the task, or if possible, delegate it; and (4) *Low Importance/Low Urgency*—batch these tasks together and knock them out all at once, delegate it, postpone it, or determine if the task is actually necessary. JOHN C. MAXWELL, *DEVELOPING THE LEADER WITHIN YOU* 23 (1993).

²² How do you eat an elephant? One bite at a time. Rather than being paralyzed by vague concerns about twelve massive courts-martial, the successful trial counsel knows the next step for each of her twelve courts-martial and works to address that particular step. Upon completion, she moves to the next step.